

Transition: Hot Topics and Key Legal Issues

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Some Introductory Thoughts

- We don't get many calls about transition...until they file a complaint
- When we see IEPs with transition services, they tend to conflate the "assessment" piece with the "services" piece
- We think *Andrew F.* has the potential to impact transition as much as any other area
 - "An IEP is not a form document."
 - Read it!

What are transition services? 34 C.F.R. 300.43

(a) Transition services means a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

What are transition services? 34 C.F.R. 300.43

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—

- (i) Instruction;
- (ii) Related services;
- (iii) Community experiences;
- (iv) The development of employment and other post-school adult living objectives; and
- (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

What are transition services? 34 C.F.R. 300.43

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

What are transition services? NDE Rule 51, § 003.63

003.63 ***Transition services*** means a coordinated set of activities for a child with a disability that is designed to be within a results-oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; is based upon the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and a functional vocational evaluation. Transition services for children with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a child with a disability to benefit from special education.

The Basics 34 C.F.R. 300.320(b)(1), (2)

- Beginning no later **than the 1st IEP in effect when the child turns 16**, or younger if determined appropriate, the IEP must include:
 - Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment and where appropriate, independent living skills; and;
 - The transition services (included courses of study) needed to assist the child in reaching those goals

Transition Meeting Participants 34 C.F.R. 300.321(b)(1)-(3)

- (b) Transition services participants.
- (1) In accordance with paragraph (a)(7) of this section, the public agency must invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals under §300.320(b).
- (2) If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.
- (3) To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

Potential IEP participants and assessment data sources

Potential IEP participants and sources of transition assessment data:

Student	Student's Family Unit	Department of Labor
Specialized Providers (SLP, School Psych, OT, PT, Teacher for Deaf/HOH/Blind/Visually Impaired)	Vocational/Career and Technical Educators (CTE)	Educators (General and Special)
Nebraska VR Counselor	School Counselor	Business Partners
Developmental Disability Services Adult Provider	Services Coordinator from Developmental Disabilities	Mental Health Service Provider
Juvenile Justice	Medical Professionals	Transition Specialist

Hot Topics and Key Issues

To graduate or not to graduate?

- "The student has 240 credits, but we're not so sure about social skills. Do we graduate him or keep him for 3 more years to work on social skills?"
- "Child in transition program; parent calling about what instructional days should look like. Not getting answers from the District."
- "Child is 18 y.o. on the spectrum and spends most of his time in special ed. setting. Father would rather son graduate than continue to age 21."

Do you graduate him?

- Too often staff view this is a binary choice, but it's not!
- This must be a **data-driven** decision
 - "Our data indicated" vs. "The team felt that"
- If an intensive 12-week course over the summer after senior year is appropriate, after which you can issue a diploma, do it!
- If a full day, 5 days per week schedule until age 21 is appropriate, do it!
- Not always popular with enforcement officials

And don't get a one-track mind on transition services...

**Bellflower Unif. Sch. Dist.,
69 IDELR 196 (SEA Cal. 2017)**

- Student with ASD and ID
 - Student on track to graduate with diploma
 - Student said transition testing was "pointless"
 - Assessment indicated possible careers as a "costume designer...or taxidermist"
 - Transition plan listed two goals: attend community college and get a job
 - Mother wanted student to learn adaptive and functional skills
 - Staff: can't get life skills on diploma track

**Bellflower Unif. Sch. Dist.,
69 IDELR 196 (SEA Cal. 2017)**

- Administrative Law Judge
 - Student's medical professionals uniformly stated he would not have sufficient adaptive living skills
 - "diploma bound students can also be deficient in adaptive, functional living skills that hamper them from pursuing a transition's plans post-secondary goals."
 - Awarded new IEE, compensatory education which the student could access "even after graduation"

What about participation in the ceremony?

- "Is this only for students who may continue until age out, or for students identified as SLD and didn't get English credits finished?"

What about participation in the ceremony?

- Both (probably)
- Students are allowed to participate in commencement at parent request, get a certificate of attendance, and can obtain their diploma later
 - State statute clearly contemplates students who may receive a diploma in 2 weeks or attend until they age out
- Students may get to participate in 2 ceremonies if they later obtain a diploma and the district allows them to participate in a 2nd ceremony to receive the diploma

Certificates of Attendance

79-770.

Certificate of attendance; participation in high school graduation ceremony.

At the request of a parent or guardian, a school district shall issue a certificate of attendance to a student who receives special education services under the Special Education Act, who has reached seventeen years of age, and who has not completed his or her individualized education plan. A school district shall allow a student who receives a certificate of attendance under this section to participate in the high school graduation ceremony of such high school with students receiving high school diplomas. A student may receive only one certificate of attendance and may participate in only one graduation ceremony based on such certificate. The receipt of a certificate of attendance pursuant to this section shall not affect a school district's obligation to continue to provide special education services to a student receiving such certificate.

This section does not preclude a student from receiving a high school diploma by meeting the school district's graduation requirements established pursuant to section 79-729 or in his or her individualized education plan or receiving a diploma of high school equivalency under section 79-730 upon completing the requirements of such section. The school district may allow a student who has previously participated in a graduation ceremony based on a certificate of attendance to participate in an additional graduation ceremony when such student receives a high school diploma.

Graduation: who decides, and change of placement?

- Who decides?
 - IEP team
- Change of placement?
 - Yes, send PWN and procedural safeguards
- "Summary of Performance" document?
 - Yes, from Rule 52 § 006.06E1: "a school district or approved cooperative shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals."

If the student will continue until 21, what does her school day look like?

- "If a student is DD eligible, getting SSI as an adult, but the district still doesn't think it needs a full day or full week placement, is that permissible?"

You are the experts – act like it! From *Andrew F.*

... deference is based on the application of expertise and the exercise of judgment by school authorities. The nature of the IEP process ensures that . . . by the time any dispute reaches court, school authorities will have had the chance to bring their expertise and judgment to bear on areas of disagreement. **At that point, a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.**

If the student will continue until 21, what does his school day look like?

- What does the **data** indicate?
- We know and appreciate that regulators and commentators are suspicious of shortened days/weeks in "year 13" and beyond
 - Some even say it's unlawful to have a shortened day/week
- If challenged, you must have good data and be able to articulate "a cogent and responsive explanation"
- The "I" in IEP applies whether you're criticizing or supporting the school

What about parental requests to rescind a diploma?

- Increasing number of these requests/cases
- IDEA is silent on whether an ALJ/HO can rescind
- Parents and advocates have realized raising this issue brings on possible money damages in addition to compensatory education
- Courts have generally said (with some exceptions):
 - The court can't force a school to rescind a diploma
 - The court can order compensatory education
 - The court can award money damages to functionally fund services beyond the applicable time period under IDEA

In re Student with a Disability 117 LRP 20565 (SEA III. 2017)

- Student graduated, parents filed for due process alleging he was improperly graduated
- PLEP
 - Identified independent living skills "as needed"
 - Did not address student's vocational interview or ability to meet interest in attending community college and own a business
- Transition goals:
 - Only 2: tour a community college; set other goals
 - Did not include present levels
 - Were not individualized

**In re Student with a Disability
117 LRP 20565 (SEA III. 2017)**

"The Student expressed a desire to attend community college. However, there were no goals or transition services designed to provide increased support in the areas needed for him to pursue enrollment in a community college business program. Further, it was noted that the Student had no competitive vocational experience and he had identified independent living skill deficits. However, the District did not provide the Student with any vocational services nor did it provide any independent living skill assessment, goals, or services. The District failed to provide a transition plan, based upon age-appropriate transition assessments, to facilitate the Student's movement from school to post-secondary education, employment, and independent living and thus denied him FAPE."

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**In re Student with a Disability
117 LRP 20565 (SEA Ill. 2017)**

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**In re Student with a Disability
117 LRP 20565 (SEA Ill. 2017)**

- "The Student is a 20-year old male who graduated from high school May 25, 2014. The Student currently lives with his mother and grandmother. He is not prepared to go to college, does not leave his home much, does not socialize with friends, does not drive and does not know how to take public transportation."
- Remedy:
 - Did not rescind diploma
 - Ordered compensatory education
 - Placed student at a private therapeutic day school for post-secondary students for two years at district's expense

**Work Experience/Vocational
Legal Issues**

What are the responsibilities of parents, child, school, and business?

- "It depends."
- Have an agreement which clarifies the nature of the services and sorts through issues under the FLSA, IDEA, FERPA, and "ATOS"
 - Generally must be for the benefit of the student
 - Must not be displacing a regular employee
 - Specific requirements to avoid wages
 - Hours limitations—depends upon type of program (e.g., some at 18/week; some at 3/day, or 1/day)

What are the responsibilities of parents, child, school, and business?

- **Beware:** "Hey, any work experience kids this year?"
- Watch out for *Olmstead*/ADA/504 issues
- Insurance issues and wage issues likely to be key for participating employers
- Employers are not going to like the agreement...
- School must ensure students are given experiences consistent with age, maturity, and ability...

Work experience and PWN...oh my!

- "Each time a student changes work experience programs, sites, etc., does that require a PWN?"

Work experience and PWN...oh my!

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

Work experience and PWN...oh my!

- "It depends."
- Must look at how it is worded in the IEP/transition plan
- The more specific the wording ("At Karen's Autobody"), the more likely changing locations/programs is a change in placement
- But can't be too vague so as not to adequately define the placement ("Work experience at an off-site location.")
- Our current thought: if in doubt, send a PWN and procedural safeguards, and here's why...

Wehrspann v. Dubuque Sch. Dist., 72 IDELR 212 (N.D. IA. 2018)

- Parents filed complaint against district several years after alleged violation, and after student graduated
 - Parents generally have two years from their discovery of an alleged IDEA violation to file a due process complaint
 - Period may be extended if the district failed to provide information the IDEA requires
- Parents: District's child find violation constituted a refusal to evaluate, triggering PWN requirements
 - PWN would have informed parents of procedural safeguards

**Wehrspann v. Dubuque Sch. Dist.,
72 IDELR 212 (N.D. IA. 2018)**

- HO: Complaint is not timely
 - Parents appeal to court
- Court: District's failure to provide PWN constituted a failure to inform parents of safeguards, which can toll the two year period
 - If we don't toll the 2-year requirement, schools will be incentivized to ignore child find rather than initiate it but then refuse to evaluate
 - Remand to H.O. for further proceedings

Transition Assessments...

Transition assessments...

- "What is a legally defensible transition assessment? Or what are the elements of it? Or how about the difference between legally defensible and not?"

Transition assessments...

- There is no form or rubric, but go back to the basics: general IEP requirements and definition of "transition services"
- Whatever you do, don't make the resulting plan the exact same for every student or use a checklist only
 - *Andrew F:* "An IEP is not a form document."
- The NDE Transition Planning Guidance Document is excellent
- We like relying on it and making team members read it and rely on it to preserve an argument of administrative deference
 - It has model questions, discussion topics, etc.
 - NDE website has lots of good information on career planning, etc.

S.G.W. v. Eugene Sch. Dist., 69 IDELR 181 (D. Ore. 2017)

- High school student with ASD
- Every student takes a career class, participates in a career day, and tours a college
- Transition goals:
 - Learning skills related to a job in the law, acquiring a part-time job in a legal office, and learning to cook, maintain an apartment, and make a budget
 - Goals were not based on age appropriate transition assessments, but only on a single interview with student

S.G.W. v. Eugene Sch. Dist., 69 IDELR 181 (D. Ore. 2017)

- Transition services:
 - Student would take two "transitions" classes (finance and career), participate in a career day, and visit a local community college
 - These courses are generally available to all students as electives to help prepare for life after HS and determine career interests

**S.G.W. v. Eugene Sch. Dist.,
69 IDELR 181 (D. Ore. 2017)**

- Transition implementation:
 - Student never took the career transitions class
 - Unclear whether student visited the community college
 - All student did was a single career day, which was appropriate but inadequate
- School:
 - Student chose to take other classes
 - If she had taken the career class, she would have taken transition assessments that would have informed the development of transition goals and services.

**S.G.W. v. Eugene Sch. Dist.,
69 IDELR 181 (D. Ore. 2017)**

- Court:
 - School is attempting to place the blame for any transition services deficiency on student
 - Although the IDEA does not mandate any particular transition assessment tool, a student interview, without more, is insufficient
 - Transitions classes available to all students could be a part of transition services; but can't be a one-size-fits-all

And if the student won't participate?

- "What if the student refused the accommodation offered in the IEP—can't make a student take the services? Documentation would prove that they were offered and the student didn't accept them."
- "What if the student gives minimal effort in the transition assessment process?"
- "What if the student's behavior impacts the provision of transition services everyone knows are appropriate?"

And if the student won't participate?

- An IEP is not a contract between the child and the school
- Document, document, document
- Inform parents of refusals, but be careful not to promise informing them every time in the IEP
- If a student's current placement and services aren't working, the team should consider if a change is appropriate
- Consider including a plan for continued student refusal

**District of Columbia Pub. Sch.
117 LRP 34551 (SEA DC 2017)**

- Student with ED, OHI for ADHD
- Significant behavior issues, along with multiple suspensions and truancy
- Refused to fill out interest assessments, would not participate in transition interview
 - School made phone calls, in person communication
- Mother files for due process alleging failure to provide FAPE, based in part on transition

**District of Columbia Pub. Sch.
117 LRP 34551 (SEA DC 2017)**

- "Although the update of the IEP required that a transition plan be included in the IEP and that the transition plan be based on an assessment of the student, and there was evidence that the student refused to complete the assessment, these factors do not excuse School's failure to convene an annual IEP review meeting [with a transition plan included]."
- Translation: If there's a risk that you won't be able to get annual review done and that's also your transition meeting, document your efforts and don't delay

**Avon Grove Sch. Dist.
117 LRP 31502 (SEA Penn. 2017)**

- 19 year old student with ASD
 - Extremely skilled in tech
- 13th year:
 - IEP set goals of "improving self-advocacy and emotional control"
- Served as student aid to tech teacher
 - Maliciously hacked into school's server
 - School suspended for 10 days; revoked tech privileges
- Parents claimed denial of FAPE

**Avon Grove Sch. Dist.
117 LRP 31502 (SEA Penn. 2017)**

- Hearing officer:
 - Revocation of tech privileges = change in placement
 - District would need "highly trained paraeducator" to monitor student
 - Difficulty in implementing doesn't excuse need for transition services
 - Self-advocacy goals were ill-defined; no baseline or means of evaluating progress

**What if we lack programs and resources
to do what the team thinks is right?**

**Letter to Bereuter,
20 IDELR 536 (OSERS 1993)**

▪ "What if" community experiences, the development of employment, and other post-school adult living objectives are impossible to deliver on due to demographics, location, or lack of facilities, i.e. potential employers (their liability position) or to do so intrudes on the source available to another school (neighboring larger town and school)?

**Letter to Bereuter,
20 IDELR 536 (OSERS 1993)**

▪ OSERS:
• "It does not appear that the factors described in your constituent's inquiry would be sufficient to relieve a public agency of its obligation to ensure that needed transition services are provided in these areas. 34 CFR § 300.346(b)(1)."
– Translation: impossibility is not a defense

**Failure of participating agency to
provide transition services**

(c) *Failure to meet transition objectives —(1) Participating agency failure.* If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with § 300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

Questions?

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